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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. [redacted] 98

LAWRENCE E. WALSH, United States District Judge, and WESTINGHOUSE ELECTRIC CORPORATION,

Petitioners,

—against—

JOSEPH H. LYONS and JESSIE H. LYONS, individually and as co-partners doing business under the name and style of LYONS ELECTRICAL DISTRIBUTING COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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May 25, 1955.

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IN THE

Supreme Court of the United States

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LAWRENCE E. WALSH, United States District Judge, and WESTINGHOUSE ELECTRIC CORPORATION,

Petitioners,

—against—

JOSEPH H. LYONS and JESSIE H. LYONS, individually and as co-partners doing business under the name and style of LYONS ELECTRICAL DISTRIBUTING COMPANY,

Respondents.

No.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on March 29, 1955 (R. 147; App. 42).* That judgment, pursuant to the majority opinion of the Court (R. 117-30; App. 13-24), ordered a writ of mandamus to issue directing the Honorable Lawrence E. Walsh, Judge of the United States District Court for the Southern District of New York, to vacate his order (R. 63) staying proceedings in a treble damage antitrust action in said District Court by respondents against Westinghouse Electric Corporation. The stay ordered by the District Court was to run until

*References marked "App." are to the Appendix of this petition.

entry of final judgment in a contract action by Westinghouse against respondents in the New York Supreme Court that had involved, by way of an adjudicated antitrust defense, the same issues that respondents raise in the District Court.

The Court of Appeals granted mandamus on the theory that under no circumstances could the adjudication of the antitrust defense by the State Court have any effect upon the decision of the District Court.

OPINIONS BELOW

The opinion of the District Court (R. 60-62) is reported in 16 F. R. D. 384 and is printed in the Appendix hereto, *infra,* pp. 40-41.

The opinion of the Court of Appeals (R. 117-44) is unreported and is printed in the Appendix hereto, *infra,* pp. 13-34.

The opinion of the Court of Appeals (R. 163-67) denying rehearing is unreported and is printed in the Appendix hereto, *infra,* pp. 35-39.

JURISDICTION

The judgment of the Court of Appeals granting the petition for mandamus was entered March 29, 1955 (R. 147; App. 42). Rehearing was denied on April 25, 1955 (R. 168).

Issuance of a writ of mandamus in accordance with the opinion of the Court below was stayed on May 3, 1955, pending the filing of a petition for a writ of certiorari and final disposition of this case by this Court (R. 181).

The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code [28 U. S. C. § 1254(1)].

QUESTIONS PRESENTED

1. Whether a District Court, in an action under 15 U. S. C. § 15, may order a stay of proceedings pending entry of a final judgment in a State Court action between the same parties and involving the same issues, in order that the District Court may then determine the effect on its decision of that State Court adjudication.

2. Whether a Court of Appeals may, by writ of mandamus, compel a District Court to vacate its order granting such a stay, on the ground that the State Court adjudication could in no event affect the decision of the Federal Court action.

STATUTE INVOLVED

The statute involved is Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, which provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

STATEMENT

Respondents operated as a business partnership from July 1944 until December 1951, under a series of annual contracts with Westinghouse Electric Corporation, as distributor-agents in the New York Metropolitan Area of Westinghouse electric lamps. On February 8, 1952, Westinghouse sued respondents for an accounting in the Supreme Court of the State of New York (hereinafter called the State Court action). On June 20, 1952, in an

amended answer served in the State Court action (R. 82-88), respondents pleaded, as a defense, that the annual agency contracts and the transactions from 1944 through 1951, between Westinghouse and respondents, had been promotions of a conspiracy between Westinghouse and General Electric Company, illegal under the antitrust laws of the United States and of the State of New York.

On July 8, 1952, respondents filed their complaint in the action at bar (R. 89-100). That complaint is in two counts, each for a separate claim. The first count, against Westinghouse and General Electric Company, is for damages said to arise out of an alleged conspiracy in violation of the federal antitrust laws generally. The other count, against Westinghouse alone, claims damages for alleged violations of the Clayton and Robinson-Patman Acts.

It is conceded both by respondents and by the Court below that the issues necessarily involved and presented in respondents' antitrust defense in the State Court action are the identical issues that comprise the claim of respondents against Westinghouse in the case at bar (R. 71-72, 120, 122, 125, 167; App. 16, 18, 20, 38).*

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*Indeed, on October 7, 1952, eight months before trial of the State Court action, respondents moved in the case at bar to enjoin further proceedings by Westinghouse in the State Court action. Respondents urged that an adjudication of their antitrust defense in the State Court action could estop their cause against Westinghouse in the case at bar (R. 24). In his affidavit submitted to the District Court in support of respondents' motion for an order enjoining Westinghouse, present counsel for respondents, among other things, stated:

> "Precisely the same issues appear in the state court accounting action . . .
>
> "
>
> . . .
>
> "There is necessarily involved and presented in the state court action plaintiffs' cause of action presented in the complaint herein. . . ." (R. 71-72).

The District Court denied respondents' motion. Its decision was affirmed by the Court below, and certiorari was thereafter denied by this Court. *Lyons et al.* v. *Westinghouse Electric Corporation,* 201 F. 2d 510, *cert. denied,* 345 U. S. 923.

On May 19, 1953, on completion of extensive examination and discovery before trial of Westinghouse by respondents, the State Court action went to trial. On October 6, 1953, the State Court filed its decision, directing respondents to account as agents of Westinghouse. In support of its decision, the State Court found, among other matters,

> "the third defense of illegality, based upon violation of anti-trust laws, has neither been sustained nor established." (R. 107)

An interlocutory judgment was entered upon the State Court decision (R. 75). Respondents appealed from that decision, and their appeal is still pending.

On August 2, 1954, following demand by respondents to re-examine Westinghouse officers and employees upon those same issues that had been decided adversely to respondents in the State Court action, Westinghouse moved in the case at bar to stay further proceedings therein pending final determination of the State Court action (R. 64-108).* A stay was necessary to relieve the parties and the District Court of the prejudice and burden of relitigating once-tried issues (R. 73-77).

After argument, the motion for stay was granted, the District Court being satisfied, first, that there were sufficient precedents in the federal courts [*Straus* v. *American Publishers' Ass'n.*, 201 Fed. 306 (2d Cir.); *Singer* v. *A. Hollander & Son*, 202 F. 2d 55 (3d Cir.); *cf. Partmar Corp.* v. *Paramount Corp.*, 347 U. S. 89] to suggest that a final judgment in the State Court action would raise an

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*Although the merits of the claim in the case at bar had been decided in full in the State Court action, Westinghouse might not plead the interlocutory judgment of the State Court as an estoppel. Under the doctrine of res judicata, only a final judgment may be so pleaded. *Cf. Joseph T. Ryerson & Son* v. *Bullard Machine Tool Co.*, 79 F. 2d 192 (2d Cir.).

estoppel and, second, that respondents would not be prejudiced by an arrest of proceedings pending determination of the scope of that estoppel.

On March 29, 1955, the Court of Appeals for the Second Circuit, one judge dissenting, granted a petition for a writ of mandamus ordering the District Judge to vacate the stay.* Decision to issue the writ rests on the conclusion that the District Court refused to proceed pending

> "a final judgment of the state court that can have no effect upon the decision of the action at bar." (R. 130; App. 24)

The conclusion that the State Court judgment could not operate as an estoppel in the action at bar was reached despite a recognition by the Court below that in the State Court action

> "The merits of the claim here involved have been decided, and . . . (R. 120; App. 16) the finding that there was no conspiracy . . . was . . . of a kind that courts treat as estoppels." (R. 125; App. 20)

According to the Court below, when, in Title 15, U. S. C. § 15, Congress gave district courts of the United States exclusive jurisdiction to award damages for acts forbidden in the antitrust laws, it meant not only that a "person who shall be injured" must sue in a district court to recover damages, but that

> "the district court must have unfettered power to decide the claim, regardless of the findings of any other courts, even when these were essential to the

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*Westinghouse was granted permission by the Court below to intervene in the mandamus proceeding (R. 53).

decision of actions over which their jurisdiction was unquestioned." (R. 125-26; App. 20)*

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below that a final judgment in a state court action cannot affect, under any circumstances, the decision of a district court in a treble damage antitrust suit overrules a prior decision of that court, *Straus* v. *American Publishers' Ass'n,* 201 Fed. 306, and is directly in conflict with the decision of the Court of Appeals for the Third Circuit in *Singer* v. *A. Hollander & Son,* 202 F. 2d 55. In the latter case, plaintiff sued under the federal antitrust statutes for damages and for injunctive relief, and, in a judgment affirming a decision of the District Court granting summary judgment, a unanimous Court of Appeals held that prior findings of a state court were estoppels in the federal action. The Court below, conceiving the *Singer* case to be "a suit in equity" only, has attempted to distinguish it by saying that the point decided there did not concern the effect of a judgment of a state court "upon a claim or cause of action . . . to recover damages for violation of the Anti-Trust Acts" (R. 165; App. 37). Without conceding that such a distinction would be probative,** we note, by reference to the opinion in the

*In the opinion of the Court of Appeals denying rehearing, Judge Learned Hand, for himself, suggests that estoppels might result from "specific findings of fact" of the State Court; but, although a final judgment of the State Court has not yet been entered, he nevertheless adhered to the conclusion that the writ should go (R. 166-67; App. 38-39).

**Title 15, U. S. C. section 26 reposes exclusive jurisdiction in the district courts of the United States to grant injunctive relief to persons threatened by loss or damage by reason of violations of the antitrust laws. The Court below has held that when, pursuant to 15 U. S. C. § 15, those same courts exercise their exclusive jurisdiction to award damages for antitrust violations, their decisions are immunized against estoppel by state court judgments. It is difficult to understand the logic that would extend immunity to decisions under Section 15 but not to those under Section 26.

Singer case, that the plaintiff there asserts

> "violation of federal antitrust legislation and claims damages and injunctive relief." 202 F. 2d at 56.

2. If construed as an expression of the position taken by Judge Learned Hand on rehearing, the decision below is in conflict with decisions of other Courts of Appeals and, more importantly, with decisions of this Court. Judge Hand, bending to the authority of *Becher* v. *Contoure Laboratories,* 279 U. S. 388, conceded on rehearing that material facts found in a state court action may, after entry of a final judgment there, be pleaded as estoppels in a treble damage action under Section 15. But Judge Hand would not allow that nexus of facts necessarily found, but not specifically stated, by the State Court to operate as an estoppel in the action at bar. He would constrict rigorously the doctrine of collateral estoppel, limiting it to "specific findings of fact" (R. 166, App. 38). Decisions of this Court uniformly have held that where operation of the doctrine of estoppel by judgment is appropriate, it will embrace "those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." *Partmar Corp.* v. *Paramount Corp.*, 347 U. S. 89, 91, *quoting and approving Cromwell* v. *County of Sac,* 94 U. S. 351, 353. Moreover, this Court has repeatedly held that it is not prerequisite to operation of an estoppel that the adjudication of a particular fact, question or right be evidenced by engrossment in a formal finding. Recourse to the pleadings and deductive logic, to extrinsic evidence, including parol evidence, is appropriate to prove what was actually adjudged in the prior action. *Davis* v. *Brown,* 94 U. S. 423; *Oklahoma* v. *Texas,* 256 U. S. 70; *Grubb* v. *Public Utilities Commission,* 281 U. S. 470.

In any case, it would be premature to assume, prior to entry of a final judgment in the State Court action, what specific findings of fact may be made by the State Court.

Indeed, the Appellate Division of the New York Supreme Court, the court to which respondents have appealed from the interlocutory judgment entered in the State Court action, has the power to make its own separate findings, even when it affirms the facts and the judgment of the trial court. *Harry S. Goodman* v. *Samuel Marcus et al.*, 279 App. Div. 1059 (1st Dept. 1952). The District Court stayed proceedings before it because it preferred to have the State Court judgment in hand when passing upon the scope of the estoppel that judgment might raise. The propriety of that procedure cannot be doubted.

3. The questions presented are clearly of importance, affecting as they do both the inter-relationship of the state and federal courts in the administration of the antitrust laws and the proper functioning of the federal judiciary. Those important questions have not been, but, in the public interest, should be, settled by this Court. The decision below proceeds upon the assumption that federal rights under the antitrust laws are so inadequately protected in the state courts that judgments of those courts are unfit to raise estoppels in federal fora (R. 129; App. 23). It also criticizes the appellate process as burdensome if state courts go wrong (R. 129; App. 23). *But cf. Amalgamated Clothing Workers of America, et al.*, v. *The Richman Brothers,* 348 U. S. 511. How such attitudes will affect future state court trials of federal antitrust defenses is not hard to guess. "Universal distrust creates universal incompetence." *Graham* v. *United States,* 231 U. S. 474, 480.

Unless this Court is satisfied that no State Court adjudication could, under any circumstances, affect the ultimate decision on the merits of the case at bar, issuance of a writ of mandamus by the Court below would constitute an unwarranted interference with the discretion of the District Court to manage its own calendar and to defer decision

as to the existence and scope of any estoppel until such questions were suitably presented on the basis of a final State Court judgment. *Cf. Landis* v. *North American Co.*, 299 U. S. 248; *Crosley Corporation* v. *Hazeltine Corporation*, 122 F. 2d 925 (3d Cir.); *Radio Corporation of America* v. *Igoe*, 217 F. 2d 218 (7th Cir.), *cert. denied*, 348 U. S. 973.

The decision below turns squarely and solely upon construction of 15 U. S. C. § 15 as a matter of law. That question of law is fundamental, not only to a determination of the propriety of the stay granted by the District Court, but to further conduct of the case. Unreversed, the decision below can require the District Court to deny an eventual motion to dismiss based on the final judgment entered in the State Court action. There could be no appeal from denial of that motion by the District Court until after trial and entry of a final judgment. Therefore, if this decision is erroneous, failure to review it now remits the parties and all the courts below to the extraordinary inconvenience and embarrassment of relitigating issues already decided in the State Court action.

4. The decision below is believed to be erroneous. As Judge Hand concedes in the opinion denying rehearing, this Court, in *Becher* v. *Contoure Laboratories*, 279 U. S. 388, has settled it that a fact incidentally determined by a state court operates as an estoppel in a later federal court action, even as to a federal specialty (R. 166-67; App. 38-39). Certainly, it is more appropriate so to treat the cluster of facts necessarily embraced in a state court judgment adjudicating a federal antitrust defense. When such a defense is raised before it, a state court is required by the antitrust laws and the Constitution to withhold its aid "not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of individual parties." *Continental Wall Paper*

Co. v. *Voight & Sons Co.*, 212 U. S. 227, 262. Determination by a state court of federal rights that can by their own force forestall state court aid to a plaintiff is not trivial action, incidental to an exercise of state court jurisdiction. Such a determination epitomizes one of the more delicate points of interaction in our federal system. When we presume that state courts are unfit arbiters of federal law, we cut close to the roots of an efficient administration of justice in the United States. It is, therefore, difficult to believe that such a presumption lies embedded in the language of Section 15.

But the majority in the Court of Appeals urges that "untrammeled jurisdiction of the federal courts" to award the remedies of the antitrust laws is necessary to accomplish "an administration of the Acts, at once effective and uniform" (R. 129; App. 23). Nothing in the legislative history of the Sherman or Clayton Acts suggests that the limitation in 1890 and thereafter of the role of state court enforcement of the antitrust laws turned on a belief that those laws could be "uniformly administered" only by federal courts.* On the contrary, the history of the provision that is now Section 15 shows both an intent by Congress to apply state antitrust techniques and limitations to the problems of interstate restraint of trade and a strong desire, constrained largely by concepts of penalty and sovereignty, to have the state courts join the federal attack on the trusts.** It is not a novelty in our law that federal

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*The fact that Congress did not provide a uniform limitations period for the Sherman Act, but left that matter to be controlled, under the Rules of Decision Act [28 U. S. C. § 1652], by state law, hardly imports concern for nationally uniform application of the remedies of the statute.

**Sen. Doc. 147, 57th Cong., 2d Sess. (1903), *Bills & Debates in Congress Relating to Trusts, 50th Cong. to 57th Cong., 1st Sess.*, pp. 92, 93, 98, 106, 150, 205, 309-13, 316-18, 320-21; Sen. Rep. No. 698, 63d Cong., 2d Sess., 9 (1914); H. R. Rep. No. 627, 63d Cong., 2d Sess., 14 (1914).

rights should be vindicated by the processes of state courts.*

Further, it would seem that application of a doctrine so well settled and fundamental as that of res judicata should not be altered by federal courts acting on a premise that state judges perform their duties under federal law less competently than does the federal bench. Retraction of so traditional an incident of our law falls more appropriately within the function of the Congress.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 25, 1955.

*See 13 Cornell L. Q. 499, 507-09.

APPENDIX

United States Court of Appeals

FOR THE SECOND CIRCUIT

OCTOBER TERM, 1954.

Motion argued January 3, 1955 Decided March 29, 1955

JOSEPH H. LYONS and JESSIE H. LYONS, individually and as co-partners doing business under the name and style of LYONS ELECTRICAL DISTRIBUTING COMPANY,

Plaintiffs-Appellants,

v.

WESTINGHOUSE ELECTRIC CORPORATION and GENERAL ELECTRIC COMPANY,

Defendants-Appellees.

JOSEPH H. LYONS and JESSIE H. LYONS, individually and as co-partners doing business under the name and style of LYONS ELECTRICAL DISTRIBUTING COMPANY,

Petitioners,

v.

THE HONORABLE LAWRENCE E. WALSH, UNITED STATES DISTRICT JUDGE,

Respondent.

Docket Nos. 23312, 23325

Before L. HAND, MEDINA and DIMOCK, Judges.

This case comes up on a motion by the defendant Westinghouse Electric Corporation to dismiss an appeal by the plaintiffs from an order of the District Court for the Southern District of New York (Walsh, J., presiding); and on a petition for a writ of mandamus to direct Judge Walsh to vacate the order, in case the appeal is dismissed.

Albert R. Connelly and John D. Calhoun for the motion, and in opposition to the petition.

Copal Mintz, opposed to the motion, and on behalf of the petition.

L. HAND, Circuit Judge: The defendant, Westinghouse Corporation, with the support of an affidavit of the General Electric Company, moves to dismiss an appeal taken by the plaintiff from an order staying all further proceedings in the prosecution of the action at bar, pending the final determination of an action in the Supreme Court of New York brought by the Westinghouse Corporation against the plaintiffs. As an alternative, if the appeal is dismissed, the plaintiffs petition for a writ of mandamus to direct Judge Walsh to vacate the same order. The complaint in the action at bar was in two counts, each for a separate claim. One of these was against the Westinghouse Corporation and the General Electric Company on a claim for damages arising out of a conspiracy in violation of the Anti-Trust Acts; the other was against the Westinghouse Corporation alone on a claim for damages for the violation of the Clayton and Robinson-Patman Acts. Before the plaintiffs brought the action the Westinghouse Corporation had sued them in the state court, demanding that they account for the breach of a contract made with it as its agents for the sale of electric lamps; to which as one of their defences the plaintiffs at bar pleaded

that the Westinghouse and General Electric companies had entered into the same conspiracy to restrain competition in the marketing of such lamps. On October 6, 1953, the state court after a trial to a judge filed a decision, directing the plaintiffs to account as agents of the Westinghouse Corporation; in support of which among other matters it found that the "defense of illegality, based upon violation of anti-trust laws, has neither been sustained nor established." An interlocutory judgment was entered on this decision, from which the plaintiffs at bar have appealed, and the appeal is still pending.

The Westinghouse Corporation argues that the order on appeal was no more than "a mere stay of proceedings which a court of law, as well as a court in equity, may grant in a cause pending before it by virtue of its inherent power to control the progress of the cause so as to maintain the orderly processes of justice"*; and that, therefore, even though the federal action is at law, we should not treat the order as a substitute for a decree in equity enjoining its further prosecution. Judge Medina and Judge Dimock agree with this position and the motion to dismiss the appeal will therefore be granted. Although I should be personally disposed to hold that the order falls within the doctrine of *Enelow* v. *N. Y. Life Insurance Co., supra* (293 U. S. 379), *Shanferoke Coal & Supply Corporation* v. *Westchester Service Corporation,* 293 U. S. 449; and *Ettelson* v. *Metropolitan Life Insurance Co.,* 317 U. S. 188, rather than within that of *City of Morgantown* v. *Royal Insurance Co., Ltd.,* 337 U. S. 254, *Baltimore Contractors* v. *Bodinger,* 348 U. S. 176, and *Mottolese* v. *Preston,* 172 Fed. (2) 308 (C. A. 2), it does not seem to me that it would serve any purpose to set out my reasons, especially on a question which at best is open to so much debate. Hence

**Enelow* v. *N. Y. Life Insurance Co.,* 293 U. S. 379, 381, 382.

the question arises whether the occasion is one in which it it is proper to resort to mandamus. Our decisions in *Mottolese* v. *Kaufman,* 176 Fed. (2) 301 and *P. Beiersdorf & Co., Inc.* v. *McGohey,* 187 Fed. (2) 14, are controlling as to the propriety of this method of review; and, indeed, the situation presents a stronger reason for resorting to it than existed in either of those decisions. The merits of the claim here involved have been decided, and will go to final judgment as soon as the account has been judicially settled; when that happens the Westinghouse Corporation will be in a position to plead the judgment as an estoppel, and, if it is successful, that will dispose of the action at bar without a trial. It is true that the estoppel will not, literally speaking, end the jurisdiction of the district court; but it will do so in substance, if it is an estoppel at all, for it will conclude any further consideration of the existence of the conspiracy, and on that all else depends. For this reason we hold, quite aside from the two decisions just cited, that the question whether a final judgment will be an estoppel so nearly touches the jurisdiction of the district court, as to make it proper for us to entertain the petition for mandamus. *Cf. Ex parte Wagner,* 249 U. S. 465, 471.

The first defence which the plaintiffs at bar pleaded to the action in the state court was in seven separately numbered paragraphs, the first of which alleged that the Westinghouse Corporation, the General Electric Companies "and others" were "engaged in a mutual conspiracy together to monopolize the manufacture, distribution and sale of electric lamps in the United States." The second paragraph alleged that, in pursuance of that conspiracy, the conspirators agreed not to "sell electric lamps in the usual course of trade, but only through alleged 'agents' under their direction, control and surveillance;" and that the conspirators compelled the "alleged 'agents' to observe uniform

price schedules," and prevented "said alleged 'agents' from competing among each other." The fourth paragraph alleged that the conspirators were successful in their purpose of establishing a monopoly; and the fifth, that "by reason of the premises the defendants * * * were unable to purchase electric lamps in the ordinary and usual course of trade, and, in order to engage in their aforesaid business, were compelled to, and did, execute whatever agreements and papers the plaintiff, from time to time, prescribed or demanded, and they were compelled to, and did, comply with all other requirements specified by the plaintiff." The sixth paragraph alleged that these "agreements and transactions * * * were exacted by the plaintiff in furtherance and in execution of the aforesaid conspiracy and as an integral part of the carrying out thereof"; and the seventh, that "by reason of the premises, the agreements and transactions alleged in the complaint were unlawful." The complaint at bar alleged the existence of a conspiracy in so nearly identical terms that we need not repeat them; and its twelfth paragraph alleged that "by reason thereof, it was impossible for plaintiffs profitably to engage in the business of selling electric lamps without having for sale and delivery electric lamps manufactured by the defendants * * * and to carry on such business most successfully and profitably, it was necessary to handle the lamps of both defendants." The thirteenth paragraph then alleged that because of this situation "the plaintiffs were compelled to enter into written contracts * * * as 'agents' at prices and upon terms fixed * * * pursuant to the consipracy and * * * were limited to * * * selling * * * to persons designated or authorized * * * all * * * in pursuance of the conspiracy." Further, that the contract, on which the Westinghouse Corporation sued in the state court, appointed the plaintiffs its "agents" to sell lamps, consigned to it at prescribed prices and on

prescribed terms (though they were to acquire no title to them), to account to the Corporation for the prices received, less commissions, to keep books of account and render periodical reports "on forms provided by Westinghouse" and to remit the net proceeds of sales each month.

We think that the state court had undoubted jurisdiction, notwithstanding § 15 of Title 15 U. S. Code, to decide the merits of the first defence, although it involved exactly the same claim as that pleaded in the first count of the action at bar. The extent to which conspiracies under the Anti-Trust Act invalidated transactions of the conspirators with third persons apparently arose for the first time in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 550-552, where the buyer pleaded such a defence to an action for the price of goods, and the Court unanimously overruled it. Soon thereafter, however, in *Continental Wall Paper Company* v. *Voight & Sons Co.*, 212 U. S. 227, it held by a five to four vote what the minority thought was the exact opposite and what with deference it is indeed hard to distinguish. Next came *Wilder Manufacturing Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, where the seller was allowed to recover for goods sold, as in *Connolly* v. *Union Sewer Pipe Co., supra.* The opinion—page 177—gave as an explanation of *Continental Paper Company* v. *Voight & Sons, supra,* that the following "elements of illegality" had been there "inhering" in the contract of sale: "(a) the relations of the contracting parties to the goods sold, (b) the want of real ownership in the seller, (c) the peculiar obligations which were imposed upon the buyer, and (d) the fact that to allow the nominal seller to enforce the payment of the price would have been in and of itself directly to sanction and give effect to a violation of the Anti-Trust Act inhering in the sale." In *Geddes* v. *Anaconda Copper Mining Co.*, 254 U. S. 590, the Court

refused to allow a corporation to rescind the sale of its assets to another corporation on the ground that the sale had been in pursuance of a contract that violated the Anti-Trust Act; and in the course of the opinion—p. 593—said that "the remedies provided * * * for enforcing the rights created by it are exclusive." In *Small Co.* v. *Lamborn & Co.*, 267 U. S. 248, it overruled the defence to an action to recover the purchase price—page 252—because "the contracts disclosed the full transaction * * * and contemplated that the sale should pass the title without any restriction on the right of the buyer to resell as it might choose. * * * It is only where the invalidity is inherent in the contract that the Act may be interposed as a defense." Finally, in *Bruce's Juices* v. *American Can Co.*, 330 U. S. 743, in overruling the buyer's defence to the seller's action to recover for goods sold at prices illegally discriminatory under the Robinson-Patman Act, the Court said—page 755—of the Anti-Trust Act "that where a suit is based upon an agreement * * * which has as its object and effect accomplishment of illegal ends which would be consummated by the judgment sought, the Court will entertain the defense that the contract is illegal under the express provision of that statute. * * * But when the contract sued upon is not intrinsically illegal the Court has refused to allow property to be obtained under a contract of sale without enforcing the duty to pay for it because of violations of the Sherman Act not inhering in the particular contract in suit."

The upshot of these decisions, if we apprehend them aright, is that, if the conspiracy inheres in the contract in suit by a conspirator against a non-conspirator, the conspiracy is a defence, but not otherwise. It is impossible to import any exact boundaries into that word; and we shall not attempt to do so; but, whatever may be its limits, it appears to us that, when a conspirator seeks to enforce a

contract between himself and one of his "agents," whom he has employed to carry out the purposes of the illegal enterprise, the conspiracy must "inhere" in the contract. The "agent" is a coöperator with him in his illegal venture, unlike the buyer of the goods monopolized, who has not joined in the undertaking and is therefore not an abettor. The fact that the agent's coöperation is unwilling is irrelevant; although a victim of the wrong, he becomes an active promotor of it. Therefore, we think that the state court had jurisdiction to pass upon whether the defence, as alleged, was proved.

It does not, however, follow that final judgment in the state action when entered will be an estoppel in the case at bar. That would be true, we agree, except for § 15 of Title 15, U. S. Code, because, although the finding that there was no conspiracy involved questions of law as well as questions of fact, it was nevertheless of a kind that courts treat as estoppels.* Thus the inquiry comes down to whether, when Congress gave exclusive jurisdiction to the district court over wrongs committed under the Anti-Trust Acts, it only meant that the "person who shall be injured" must sue in the district court to recover damages; or whether it also meant that the district court must have unfettered power to decide the claim, regardless of the findings of any other courts, even when these were essential to the decision of actions over which their jurisdiction was unquestioned. A priori either reading seems permissible, and the decisions give an uncertain answer. The only case that we have discovered in the Supreme Court is *Becher* v. *Contoure Laboratories, Incorporated,* 279 U. S. 388. The action was by the

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**United States* v. *Moser,* 266 U. S. 236, 242; *Emich Motors Corp.* v. *General Motors Corp.,* 340 U. S. 558; *Partmar Corp.* v. *Paramount Picture Theatres Corp.,* 347 U. S. 89, 102, 103.

patentee, Becher, for the infringement of his patent; and the defendant was the corporate assignee of the rights of one, Oppenheimer, who had recovered judgment against Becher in a state court, and whose claim had been that the information on which Becher procured the grant of his patent, he had got from Oppenheimer in a confidential relation. Oppenheimer's assignee pleaded the judgment of the state court as defence, and it was held to be a good estoppel, although the consequence was to invalidate Becher's patent. The meat of the opinion is this, p. 391: "Again, even if the logical conclusion from the establishing of Oppenheimer's claim is that Becher's patent is void, that is not the effect of the judgment. Establishing a fact and giving a specific effect to it by judgment are quite distinct." That looks as though the distinction were between the finding of one of the constituent facts that together make up a claim and the entire congeries of such facts, taken as a unit; an estoppel is good as to the first but not as to the second. It is possible to read § 71* of the Restatement of Judgments with such a limitation: that is to say if "matter" be read as all the "operative" facts that together make up a right. Comment (c) would also be consonant with this in saying that the finding of a state court, as a defence to an action on a note, that a patent given as its consideration was invalid, is not an estoppel in an action in a federal court brought upon the patent. There are decisions holding that findings in courts of testamentary jurisdiction will not be estoppels in actions in other courts**; on the other hand, the Third Circuit in *United States* v. *Silliman*, 167 Fed. (2)

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*"Where a court has incidentally determined a matter which it would have had no jurisdiction to determine in an action brought directly to determine it, the judgment is not conclusive in a subsequent action brought to determine the matter directly."

**_Clark_ v. _Dew_, 1 Russ. & Milne 103; _Bogardus_ v. _Clarke_, 1 Edw. Ch. 266, aff'd. 4 Paige 623.

607, held that a finding of the Surrogate's Court of New York that there had been no fraud in a proceeding before it, was conclusive in an action in the district court. In *Loomis* v. *Loomis*, 288 N. Y. 222, the Court of Appeals decided that a finding by the "Family Court"—a division of an inferior court in New York City—that the parties had been divorced did not operate as an estoppel in an action in the Supreme Court for a declaratory judgment that the divorce was void. On the other hand in *Geracey, Inc.* v. *Hoover*, 133 Fed. (2) 25, a majority of the Court of Appeals for the District of Columbia held that the judgment of the Municipal Court of the District was an estoppel in an action in the District Court in the following situation. The defendant, a landlord, had sued the plaintiff, his tenant, in the Municipal Court to recover rent, and the plaintiff had pleaded as a set-off that the landlord had damaged his chattels in an amount greater than the Municipal Court's monetary jurisdiction. The Municipal Court dismissed the set-off on the merits, and the Court of Appeals held the finding to be estoppel in an action by the tenant to recover damages in the full amount. Judge Rutledge dissented.

It is possible that decisions like *Loomis* v. *Loomis, supra* (288 N. Y. 222) and *Geracey, Inc.* v. *Hoover, supra* (133 Fed. (2) 25) depended upon the relative authority of the court that made the findings compared with that of the court which tried the cause. That may also be the explanation of those decisions that refused to treat as conclusive the findings of a testamentary court; Judge Goodrich's careful analysis in *United States* v. *Silliman, supra* (167 Fed. (2) 607) of the powers and standing of the Surrogate's Court of New York, seems to presuppose such an interpretation. The traditional jealousy of all states of any attempt to adjudicate elsewhere interests in their real property, or in

the matrimonial status of their own domiciliaries, is enough to account for those decisions. We are in accord with what Judge Goodrich says about the doctrine of res judicata in general—page 614—: "such a rule of public policy must be watched in its application lest a blind adherence to it tend to defeat the even firmer established policy of giving every litigant a full and fair day in court." In short, it appears to us that the doctrine, like so many others in the law, must be treated as a compromise between two conflicting interests: the convenience of avoiding a multiplicity of suits and the adequacy of the remedies afforded for conceded wrongs.

In the case at bar it appears to us that the grant to the district courts of exclusive jurisdiction over the action for treble damages should be taken to imply an immunity of their decisions from any prejudgment elsewhere; at least on occasions, like those at bar, where the putative estoppel includes the whole nexus of facts that makes up the wrong. The remedy provided is not solely civil; two thirds of the recovery is not remedial and inevitably presupposes a punitive purpose. It is like a qui tam action, except that the plaintiff keeps all the penalty, instead of sharing it with the sovereign. There are sound reasons for assuming that such recovery should not be subject to the determinations of state courts. It was part of the effort to prevent monopoly and restraints of commerce; and it was natural to wish it to be uniformly administered, being national in scope. Relief by certiorari would still exist, it is true; but that is a remedy burdensome to litigants and to the Supreme Court, already charged with enough. Obviously, an administration of the Acts, at once effective and uniform, would best be accomplished by an untrammeled jurisdiction of the federal courts.

Nor is there anything inconsistent with this in allowing violations of the Acts to be raised as valid defences to

actions brought in state courts upon a claim against third persons, if it involves a partial enforcement of an undertaking itself forbidden. It is appropriate to the underlying purpose of the Acts that such claims shall not succeed, by compelling individuals on whom the wrong impinges to pay what is not due, even though they may later recover the amount three times over. For these reasons we think that the situation is one where the delay and expense of a double trial of the same issue, do not balance the importance of an uncommitted enforcement of the remedy provided in § 15.

As we have concluded that the district court has refused to proceed pending a final judgment of the state court that can have no effect upon the decision of the action at bar, we hold that its refusal was not authorized by law and that it is our duty, as it is within our power, to direct a writ of mandamus to go, ordering it to vacate the stay and to proceed in due course with the trial herein.

Appeal dismissed. Writ of mandamus to go thirty days after the filing of this opinion, directing the district court to vacate the stay in question, unless it has been vacated theretofore.

MEDINA, Circuit Judge (dissenting in part):

This opinion represents the views of a majority of the court as to the appealability of Judge Walsh's interlocutory order, and my own by way of dissent to what must be deemed the equivalent of the granting of petitioners' application for mandamus.

The Stay

Thus the first question to be decided here is whether Judge Walsh's order is in substance the granting of an

injunction, as it is beyond cavil interlocutory, and 28 U. S. C. Sections 1291 and 1292 give us jurisdiction only of appeals from "final decisions" of the United States District Courts, and also of appeals from interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions," and others not pertinent to the matter before us.

It would be difficult to find a phase of the development of Anglo-American jurisprudence which has done so much to bedevil the whole machinery of justice as the distinction between law and equity, following in the wake of the establishment of the Court of Chancery in England. Despite unceasing efforts to abolish the distinction between the two, the old technicalities persist. Our decision here is controlled by a series of Supreme Court cases,[1] beginning with *Enelow* in 1935 and concluding with *Baltimore Contractors* in January, 1955. Judge Dimock and I construe those cases as a series of perfectly consistent efforts to inquire into the historical background and determine in each case whether or not the District Court, in granting or denying a "stay" or striking a demand for a jury trial, was exercising a power such as the chancellor was, under the old or ancient practice, accustomed to call into play in a separate proceeding in equity. In other words, is the "stay" a "modern procedural substitute for a decree in chancery." Wherever this was found to be the case, despite the merger of law and equity and the advent of the new Federal Rules of Civil Procedure, the order was held to be injunctive in character and hence appealable under the statute, otherwise not. As the Supreme Court was construing statutory language long in effect, this historical approach seems to

[1] *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379 (1935); *Shanferoke Co.* v. *Westchester Co.*, 293 U. S. 449 (1935); *Ettelson* v. *Metropolitan Ins. Co.*, 317 U. S. 188 (1942); *Morgantown* v. *Royal Ins. Co.*, 337 U. S. 254 (1949); *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U. S. 176 (1955).

have been more or less inevitable, unless the Court, in search of a formula too simple to be misunderstood, had been willing to throw principle to the winds.

The first significant pronouncement upon the subject appeared in *Enelow* v. *N. Y. Life Ins. Co.*, 293 U. S. 379 (1935). In that case, plaintiff brought an action at law in a state court upon a policy of life insurance. The case was removed to the federal court and defendant interposed the equitable defense of fraud in the procurement of the policy. When the District Court then granted defendant's petition to stay the action at law until the disposition of the issues raised by the equitable defense, plaintiff appealed and the Circuit Court of Appeals affirmed. The Supreme Court addressed a portion of its opinion to the question of whether the appeal had been properly entertained and specifically indicated that the scope of the section which was the predecessor of Section 1292 was limited only to interlocutory orders "which constitute an exercise of equitable jurisdiction in granting or refusing an injunction, as distinguished from a mere stay of proceedings which a court of law, as well as a court of equity, may grant in a cause pending before it by virtue of its inherent power to control the progress of the cause * * *." The court went on to state that the power to stay proceedings in another court is peculiarly an equity power and that the grant or refusal by a court of equity of a stay of proceedings at law is a grant or refusal of an injunction within the meaning of the statute. This was specifically determined to be so even though both the suit in equity and the action at law were pending in the same court. Applying these rules to the case before it, the court concluded that in requiring the equitable defense to be tried first, the District Court had exercised an equity power to stay the proceeding at law "just as if the court had acted upon a bill of complaint in a separate suit for the same purpose," and that the Circuit Court of Appeals therefore had jurisdiction over an appeal from the order.

On the same day, the Supreme Court decided *Shanferoke Co.* v. *Westchester Co.*, 293 U. S. 449 (1935) and held that, in a breach of contract action, a special defense setting up an arbitration agreement was an equitable defense or cross bill and that a motion for a stay pending arbitration was an application for an interlocutory judgment based upon the special equitable defense. Consequently, citing *Enelow*, the District Court's denial of the motion was held to be appealable.

Next we come to *Ettelson* v. *Metropolitan Ins. Co.*, 317 U. S. 188 (1942) in which the Circuit Court of Appeals certified the question, whether, in an action at law in which the defendant files an equitable counterclaim, an order that the issue raised by the counterclaim should be heard and disposed of by the court prior to the issue raised by the complaint, is an order granting an injunction, for the purpose of determining the jurisdiction of the Circuit Court of Appeals to entertain an appeal. In holding the order appealable, despite the fact that the new Federal Rules of Civil Procedure had taken effect since the earlier decisions above discussed, the Supreme Court reaffirmed its holding in *Enelow* and stated that the plaintiffs were in the same position as if "a state equity court had restrained them from a proceeding in a law action."

Thus, in each of these three cases, appealability was limited to situations where the District Court exercised or refused to exercise its equity power to stay an original action at law in order first to determine the issues of a subsequently raised equitable defense or counterclaim.

The limited scope of appealability was further emphasized in *Morgantown* v. *Royal Ins. Co.*, 337 U. S. 254 (1949). There, the original action was the equivalent of one in equity for reformation of a contract and defendant filed a legal counterclaim to recover under the contract and

demanded a jury trial. Plaintiff moved to strike the demand and the District Court granted the motion. On plaintiff's motion, the Circuit Court of Appeals dismissed defendant's appeal from the lower court's ruling and the Supreme Court affirmed stating that this was "not a situation where a chancellor in denying a demand for jury trial can be said to be enjoining a judge who has cognizance of a pending action at law." Since the case involved no exercise of an equity power to intervene in an action at law but merely an equity court regulating its own case, *Morgantown* fits more properly into the class of cases described in *Enelow* as "a mere stay of proceedings which a court of law, as well as a court of equity, may grant in a cause pending before it by virtue of its inherent power to control the progress of the cause." It is interesting to note that in deciding as it did the court said: "Many interlocutory orders * * * may determine the outcome of the litigation, but they are not for that reason converted into injunctions."

The last link in this chain is of very recent vintage. In *Baltimore Contractors, Inc.* v. *Bodinger,* decided January 10, 1955, the Supreme Court reaffirmed the criteria set forth in the earlier decisions previously discussed. There an equitable action for an accounting was brought in a state court and removed to the federal court by reason of diversity of citizenship. The defendant, claiming the issue to be referable to arbitration under an agreement between the parties, sought a stay of the original action pending arbitration under the provisions of the United States Arbitration Act. The District Court refused the stay and the Circuit Court dismissed defendant's appeal from the District Court's ruling. The Supreme Court, limiting the scope of appealability to the *Enelow-Shanferoke-Ettelson* kind of case and citing the *Morgantown* case as controlling, affirmed the Circuit Court's decision, and

treated the District Court's action as an exercise of the power to stay steps within the framework of the litigation before a single court as distinguished from an injunction prohibiting proceedings in another court.

Thus, we are constrained to conclude from the foregoing that appealability exists in these cases only when there has been "a stay through equitable principles of a common law action."

In the case before us, Judge Walsh was not asked to exercise what was formerly an equity power to stay an action at law. True it is that this case is an original action at law, unlike both *Morgantown* and *Baltimore Contractors,* but the power exercised by Judge Walsh was simply the power to stay proceedings which "a court of law, as well as a court of equity, may grant in a cause pending before it by virtue of its inherent power to control the progress of the cause * * *." The exercise of an equity power which, under the Supreme Court rule, is an essential prerequisite to appealability is wholly absent.

Mandamus

The factual background must first be explored before the principles, governing the question of whether or not we should entertain this petition for mandamus, can be applied. Dates and the sequence of events, together with the attendant circumstances disclosed by the record before us, led Judge Walsh to conclude that the stay should be issued in the interests of justice, not because he thought the District Court lacked jurisdiction to proceed.

On February 8, 1952, Westinghouse sued its former agents, partners doing business as Lyons Electrical Distributing Company, for an accounting in the New York Supreme Court, charging widespread fraudulant practices

to conceal large sums of money due to Westinghouse. An answer was filed in due course; and, on June 20, 1952, an amended answer was served which asserted as a First Affirmative Defense that the agency contracts upon which Westinghouse sued were illegal under the Anti-trust Acts,[1] by reason of a conspiracy charged against Westinghouse and General Electric. Shortly thereafter and on July 8, 1952, the present action was commenced in the United States District Court for the Southern District of New York. Judge Walsh quite correctly observes that this was "an apparent retaliation"; and it is not disputed that the allegations of the defense in the state action and those of the complaint in this action are substantially identical.

The next move in the process of "retaliation" appears to have been a motion in this action, based upon the identity of the anti-trust issues in the two actions, for an injunction restraining the prosecution of the action for the accounting, followed by the usual notices to take the depositions of a number of Westinghouse employees and subpoenas duces tecum requiring the production of vast quantities of documents, all in support of the anti-trust charge.

But Judge Bondy denied the motion for an injunction, and his order was unanimously affirmed by this court, 201 F. 2d 510 (CA 2, 1953) and the Supreme Court denied certiorari, 345 U. S. 923 (1953). There were numerous moves and countermoves relating to the discovery proceedings and the upshot was that some 800 pages of depositions were taken and some 6000 documents produced, pursuant to orders of the state court; and the state court action proceeded to trial. Judge Walsh comments dryly, that neither side "pressed this action vigorously" and that "twenty months have passed since the pretrial order."

Lyons was defeated on the merits, however, in the state court action; the proofs were found to have revealed shock-

ing frauds, including the keeping of secret books, and the rendition of false monthly reports. The anti-trust charge, which had been the subject of much evidence pro and con at the trial, was also determnied against Lyons on the merits.[2]

True to form, Lyons, after appealing to the Appellate Division of the New York Supreme Court from the interlocutory order directing the accounting, started in again with another round of deposition taking, with the usual subpoenas duces tecum requiring the production of documents. This led to the motion for a stay, which Judge Walsh granted in the exercise of his discretion, finding, under the peculiar circumstances which the affidavits portrayed, that there was a reasonable likelihood that the final determination of the accounting action would make unnecessary the expense and hardship of the discovery procedure which Lyons was bent on pursuing. It was not claimed that the interlocutory judgment in the state court had any binding effect; but Judge Walsh doubtless thought the "retaliation" had gone far enough. And the congested condition of the court calendars in the Southern District of New York, and the added burden on the judges of supervising elaborate discovery proceedings in another anti-trust case, may well have been in his mind, even though the subject is not mentioned in his opinion. What is plain beyond argument is that the considerations which led him to grant the stay were such as are inherent in the making of interlocutory orders governing the administration of the dockets and the progress of cases prior to trial. There is nothing in the record before us to suggest that Judge Walsh lacked, or thought he lacked, power to decide the motion either way; nor does he

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[2]*Westinghouse Electric Corporation* v. *Lyons, et al.*, 125 N. Y. S. 2d 420 (S. Ct., N. Y. County, 1953).

purport to determine the question of whether the final judgment in the accounting action will have binding effect.

There is much talk nowadays on the subject of the law's delays, which are attributed to litigation arising out of the use of automobiles, the increase in the population, the complexity of modern life in an industrial age and the slow-moving processes by which improvements in the administration of justice are effected. But little is said about what is probably one cause of the principal causes of congestion of court calendars and delays which all too often result in the denial of justice. Our imposition of trivial costs on the defeated party, which makes our courts open to all, whether rich or poor, and our elaborate and justly praised discovery procedures, make our courts a happy hunting ground, where irresponsible people may make irresponsible and wholly unfounded offensive and defensive claims with impunity, in the hope that payments will be made for what is euphemistically called "nuisance value," or that the day of reckoning may be postponed and exhausted and impoverished suitors be induced to abandon just causes from lack of the wherewithal to continue to prosecute them. The existence of separate state and federal court systems multiplies the opportunity for artful maneuvers and procedural sallies which serve little purpose other than to throw sand in the judicial machinery. And it is difficult for me to avoid the conclusion that the ruling about to be made here will aid those who may wish to subvert justice by ingenious devices, by taking away from the District Judges what is one of their most useful incidental powers, that of regulating their calendars and the progress of causes before trial, in the interest of substantial justice.

My brethren say that "a final judgment of the state court * * * can have no effect upon the decision of the

action at bar." I do not see how that can be so.[3] But even if a final judgment in the state court, on these very issues of law and fact, were not binding, I still say there is no basis on this record for holding that Judge Walsh abused his discretion in granting the stay. Mere abstractions and hypothesis should not be permitted to render our District Judges powerless to deal with practical every day problems, such as the one with which Judge Walsh was called upon to deal. If permitted to run the gamut of discovery procedure against both Westinghouse and General Electric, while the Appellate Division is disposing of the appeal from the interlocutory judgment and, in case of affirmance, pending the settlement of the account and an appeal to the Court of Appeals, these two companies will doubtless be able to endure the expense and the disruption of their administrative and executive staffs, while the various officers and employees are running around answering questions and producing documents. Perhaps they will settle or withdraw

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[3]"The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified." *Southern Pacific R. R. Co.* v. *United States*, 168 U. S. 1, 48 (1897); to the same effect *Partmar Corp., et al.* v. *Paramount Pictures Theatres Corp., et al.*, 347 U. S. 89 (1954); *Becher* v. *Contoure Laboratories, Inc.*, 279 U. S. 388 (1929); *United States* v. *Moser*, 266 U. S. 236 (1924). The quotation from the *Becher* case appearing in the majority opinion relates to the distinction between the competency of the state court to decide issues properly before it and its competency to declare a patent invalid. The Supreme Court indicated only that, as to the first, the state court was competent and its decision conclusive on the federal court even though it would not have had the power to render a judgment declaring the patent invalid. So here it would seem clear that the state court's decision of the anti-trust issue properly before it would be conclusive although undeniably it would not have had the power to entertain a treble damage action.

the state action; but either eventuality seems remote. In the end, if the New York Court of Appeals affirms a final judgment against Lyons, rejecting on the merits the claims of Lyons on the anti-trust issues as well as the others, the trial of this action some years from now may proceed nevertheless when it is reached in due course; but I doubt it. In any event, other litigants under similar pressures in other cases may not be able to afford the expense of defending themselves against such procedural warfare indefinitely, and the rule of this case will, at least in this Circuit, leave District Judges no alternative other than to withhold the only remedy which will meet the necessities and practicalities of the case.

In think the writ should be withheld, even if we may be said to have the power to let it go in aid of our appellate jurisdiction, which I do not concede. See *Radio Corporation of America* v. *Igoe,* 217 F. 2d 218 (C. A. 7, 1954) certiorari denied March 28, 1955.

Judge Dimock concurs in that part of Judge Medina's opinion entitled "The Stay".

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

October Term, 1954

Petition Filed April 13, 1955 Decided April 25, 1955

JOSEPH H. LYONS and JESSIE H. LYONS, individually and as co-partners doing business under the name and style of LYONS ELECTRICAL DISTRIBUTING COMPANY,

Petitioners,

v.

THE HONORABLE LAWRENCE E. WALSH, UNITED STATES DISTRICT JUDGE,

Respondent.

Docket No. 23325

Before: L. HAND, MEDINA and DIMOCK, *Judges.*

On Petition for Rehearing

ALBERT R. CONNELLY, *for the petitioners.*

L. HAND, *Circuit Judge*:

We do not find it necessary to discuss this petition except as to three decisions that the defendants press upon us as contrary to what we held about the collateral estoppel of the state judgment if it becomes final. These decisions are *Straus* v. *American Publishers' Association*, 201 Fed. Rep. 306 (C. C. A. 2) (1912); *Singer* v. *A. Hollander & Son*, 202 Fed. (2) 55 (C. A. 3) (1953); *Partmar Corporation* v. *Paramount Theatres Corporation*, 347 U. S. 89 (1954). We take them up in their order.

In the first the plaintiffs had recovered a money judgment in a state court under a state statute against monopolies and restraint of trade. Later they sued the same defendants and others under the Sherman Act in a federal court for treble damages, and we affirmed a judgment of Lacombe, J., that dismissed the complaint because the "plaintiffs, having the option to go into either court, chose the state court, and their claim, having been there adjudicated, cannot be presented the second time to any other court." Although it was not then entirely certain that § 15 of Title 15—which had been in the original Sherman Act as § 7—made the jurisdiction of the federal courts exclusive over actions for damages for violation of the Anti-Trust Acts, we apparently thought that it did, for we said that "the complaint in this case is founded on the federal statute, which is not within the jurisdiction of the state court." We must therefore have meant to hold that the judgment of the state court, so far as it dismissed the claim as to uncopyrighted books, was a bar to the claim created by § 15. That was much more than a holding that the findings of a state court constitute an estoppel in a federal court; nevertheless we will assume arguendo that it would have been correct, had § 15 not made the jurisdiction of the federal courts exclusive over claims arising under the Anti-Trust Act; for it is apparently true that judgment upon the same set of facts is a merger or a bar in another action, even though the legal liability in the first was different from that in the second.* However, we cannot see how the jurisdiction over a claim arising under § 15 can be exclusive, if the decision of a state court upon that very claim is to be deemed a bar to an action on it in a federal court; yet that was precisely the effect of our decision in the case in question. Our

Troxell v. *Delaware, Lackawanna & Western R. R.*, 227 U. S. 434; *Baltimore S. S. Co.* v. *Phillips*, 274 U. S. 316.

decision is now over forty years old, and no other case, so far as we can find, has ever relied upon the ruling. With all deference we cannot regard it as a valid precedent.

The second case concerned an action in a federal court by an employee against his employer to have the contract between them declared invalid on the ground that it had been part of the execution of a conspiracy in violation of the Anti-Trust Acts. The employer had sued the plaintiff in a state court upon the same contract, and the plaintiff had set up as a defence that the contract was in restraint of trade. The state appellate court gave judgment for the employer overruling the defence, and finding that the plaintiff had been guilty of many unconscionable violations of the contract. The Third Circuit held that the findings of the state court as to the plaintiff's misconduct were estoppels in the federal action, and that, as such, they disqualified him from filing a suit in equity in the federal court to have the contract declared invalid. It follows that the point decided had nothing to do with the effect of the judgment of a state court upon any claim or cause of action of the plaintiff to recover damages for violation of the Anti-Trust Acts.

In the third case the Paramount Corporation had sued the Partmar Corporation in ejectment in the District Court for the Southern District of California, and the Partmar Corporation pleaded as counterclaims claims for damages for violations of the Anti-Trust Acts. The court separated the counterclaims for trial and treated them thereafter as though they were separate actions. The Paramount Corporation based the action of ejectment on the theory that the lease under which the Partmar Corporation held possession had been executed under a "franchise" which the District Court for the Southern District of New York had then held to be violative of the Anti-Trust Acts. However,

the Supreme Court reversed this ruling of that court before the ejectment action came on for trial in California; and the trial court found that the Paramount Corporation had not entered into any conspiracy that included the execution of the lease, and dismissed the action of ejectment. It also dismissed the counterclaims relying upon its findings in the ejectment action as estoppels. It is enough to distinguish the decision of the Supreme Court affirming this judgment that, even though the decision of the court in the ejectment action could be regarded as disposing of a liability under § 15, it was the judgment of a federal court that had jurisdiction over an action for damages under that section.

So it appears to both Judge Dimock and me that none of these decisions throws any doubt upon our opinion already filed. But I go further, though he does not, because I think it necessary to distinguish the situation from that in *Becher* v. *Contoure Laboratories,* 279 U. S. 388, which we mentioned in our opinion. That decision, to say nothing of our own which it affirmed, would, I believe, make the specific findings of fact of the state court, had there been any, estoppels in this action, even though the result were to put an end to the plaintiffs' claim. I concede that in effect this means that the exclusive jurisdiction of the federal court under § 15 may be impaired by a state judgment; and that the immunity which that section grants is limited to judgments of state courts that except for that immunity would be bars or mergers. I cannot read *Becher* v. *Contoure Laboratories, supra,* in any other way; but the judgment of the state court here disposed of the plaintiffs' claim in just the sense that the immunity covers, if so limited. On the other hand the findings in *Singer* v. *A. Hollander & Son, supra,* were not of that kind; nor were those in *Paramount Corporation* v. *Partmar Corporation,*

supra (347 U. S. 89); as appears from the following passage in the opinion, pp. 100, 101: "Neither the lease nor the franchise was the result 'of any agreement, combination or conspiracy of any kind whatsoever.' * * * This finding * * * determined the *key ingredient* of Partmar's counterclaims contrary to its allegations and thus precluded recovery upon such claims * * * the judgment entered on the complaint was a final disposition of the *determinative* issue on the counterclaims—whether or not the terms of the lease were a product of an illegal conspiracy."

The petition is denied.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JOSEPH H. LYONS and JESSIE H. LYONS, individually and as co-partners doing business under the name and style of LYONS ELECTRICAL DISTRIBUTING COMPANY,

Plaintiffs,

—*against*—

WESTINGHOUSE ELECTRIC CORPORATION and GENERAL ELECTRIC COMPANY,

Defendants.

Civ. 77-94

Memorandum

WALSH, D. J.

Defendants move to stay further proceedings in the above entitled action pending the outcome of an accounting proceeding in the courts of the State of New York in which they claim identical issues are being considered and in which an interlocutory order for an accounting has already been entered.

The motion is granted.

This action to recover triple damages for violation of antitrust laws was commenced by plaintiffs after Westinghouse had initiated a proceeding in the State Court to recover from them for dishonest accounting. Plaintiffs were agents of Westinghouse in the distribution of electric lamps. A claim of antitrust violation was raised by them as a defense in the State action and was found unsubstantiated. An accounting has been ordered and its conclusion now awaits their prosecution of an appeal.

Plaintiffs claim they should be permitted to take the depositions of the officers and employees of the defendants without further delay. They have already examined the officers and employees of Westinghouse in the State action. Depositions cover 800 pages of testimony and 6,000 documents.

They have not examined General Electric because a pre-trial order requires that these depositions follow those of Westinghouse.

The expense and hardship of depositions in an antitrust proceeding should not be compelled when there is reasonable likelihood that the conclusion of the State proceeding will make it unnecessary to try the action pending here. Especially is this true when the antitrust charge was an apparent retaliation to a proceeding to recover for false accounting. It is no longer a matter of charge and counter charge; the State Court has found the antitrust claim unsubstantiated and it further found that:

> "* * * The defendants boldly admitted not only that a special, and apparently secret, consignment ledger was kept but also that their monthly reports were false and to such an extent that even they themselves were unfamiliar with all of the details. These admissions cast a very severe and obvious pall over the defendants' position. * * *"

The "obvious pall" cast over the plaintiff's position in the State Court extends here.

There is no showing that they will be improperly prejudiced by delay. Neither plaintiffs nor defendants have pressed this action vigorously. Twenty months have passed since the pre-trial order.

Motion granted. Settle order.

LAWRENCE E. WALSH
United States District Judge

Dated: August 23, 1954

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 29th day of March, one thousand nine hundred and fifty-five.

Present:

Hon. Learned Hand
Hon. Harold R. Medina,
Circuit Judges,

Hon. Edward J. Dimock,
District Judge.

Joseph H. Lyons & Ano., etc.,
Petitioners,

v.

Hon. Lawrence E. Walsh, U. S. D. J.,
Respondent.

Order

A petition for a writ in the nature of a writ of mandamus having been filed herein by counsel for petitioner and argument having been had thereon,

Upon consideration thereof, it is

Ordered that a writ of mandamus shall issue at the expiration of thirty days from today directing the District Court to vacate the stay in question, and to proceed in due course with the trial herein, unless the stay in question has been vacated theretofore in accordance with the opinion of this Court.

A. Daniel Fusaro
Clerk

JUN 7 1955
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. [redacted] 98

LAWRENCE E. WALSH, United States District Judge, and WESTINGHOUSE ELECTRIC CORPORATION,

Petitioners,

against

JOSEPH H. LYONS and JESSIE H. LYONS, individually and as co-partners doing business under the name and style of LYONS ELECTRICAL DISTRIBUTING COMPANY,

Respondents.

RESPONDENTS' BRIEF

IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

COPAL MINTZ,
Attorney for Respondents,
150 Broadway,
New York 38, N. Y.

June 6, 1955.

ACKERMAN PRESS, Phones BO 9-7107-8

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In The

Supreme Court of the United States

OCTOBER TERM, 1954

No. 818

LAWRENCE E. WALSH, United States District Judge, and WESTINGHOUSE ELECTRIC CORPORATION,

Petitioners,

against

JOSEPH H. LYONS and JESSIE H. LYONS, individually and as co-partners doing business under the name and style of LYONS ELECTRICAL DISTRIBUTING COMPANY,

Respondents.

RESPONDENTS' BRIEF

OPPOSING THE GRANTING OF A WRIT OF CERTIORARI TO REVIEW AN ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, ENTERED MARCH 29TH, 1955, THAT A WRIT OF MANDAMUS ISSUE TO PETITIONER LAWRENCE E. WALSH, U. S. D. J., TO VACATE A STAY ORDER MADE BY HIM AND TO PROCEED WITH THE ACTION "IN DUE COURSE."

The Question Which Is Really Presented

The petitioners concede that there is no State court judgment which they presently claim to be *res judicata* (Pet. p. 5).

Solely in anticipation that there will be such a judgment *some years hence* (see R. pp. 36-7), in Petitioner Westinghouse's action for an accounting in the New York Supreme Court, the District Court stayed until there is a final judgment in that State court action (R. p. 7) all proceedings—including the taking of pre-trial depositions—in respondents' anti-trust action in the District Court against Petitioner Westinghouse and the General Electric Company for treble damages under 15 U. S. C. 15. The District Court issued that stay order so that, and in the expectation that, the eventual "final determination" by the State court of Westinghouse's action for an accounting shall serve to determine also the treble damage causes of action pending solely in the District Court and over which the State court may not exercise any jurisdiction. "There is reasonable likelihood", reasoned the District Judge (Petitioner Walsh), "that the conclusion of the State proceeding will make it unnecessary to try the action pending here" (Pet. p. 41).

Implicit, if not express, in that holding and in the resultant order are that: (1) the final judgment in the State court action, when rendered, will be *res judicata* of the Federal action if the trial of the latter is delayed long enough; and (2) the plaintiffs in the Federal court action —contrary to the mandate of the precedents (see *infra*, pp. 5-6)—should be denied the right to have their case proceed in normal course and the Federal court should defer and *abdicate its jurisdiction* to the State court, to the end that plaintiffs' exclusively Federal causes of action shall be determined by a judgment of that State court.

The stay order being unappealable, or so held (Pet. pp. 14-15, 24-29, 34; R. p. 145), the Court of Appeals, in the exercise of its supervisory jurisdiction over the District Courts, has done no more than direct the District Court to terminate the suspension and to proceed in the ordinary

and usual course. In that connection, a majority of the court held that the judgment in the State court action will not be *res judicata* in the Federal court action. Their reasoning is that since the latter arises solely under Federal statute which vests jurisdiction thereover exclusively in the Federal courts, it cannot and may not be determined by any other tribunal or by the judgment of any other tribunal (Pet. pp. 16-24, 35-39).

The question then is: Should this court, in the circumstances above outlined, review the mandate of the Court of Appeals that the case in the District Court not be stayed and "proceed in due course"?

The Alternative Consequences

Petitioners argue (Pet. p. 10) that in the absence of a reversal by this Court of the direction of the Court of Appeals, the District Court will be required "to deny an eventual motion to dismiss [plaintiffs' case] based on the final judgment entered in the State court action"; that denial would be unappealable; the case then would go to full trial "to the extraordinary inconvenience and embarrassment" of the parties and the courts; yet, thereafter, it might be held that the State court judgment was conclusive.

That argument *overlooks* the likelihood that the case in the District Court, if proceeded with without abnormal delay, might be tried and decided before there is any final judgment in the State court (R. pp. 17, 76). *Thus the presently anticipated issue of res judicata might never arise.* It would not have arisen if Judge Walsh had not ordered the stay, for in the absence thereof the Federal cause already would have been tried (See R. pp. 17, 76), unembarrassed by a final State court judgment. It is only Westinghouse's desire of delay and of subordination to

a forum not authorized to try the plaintiffs' causes of action that led Westinghouse anticipatorily to raise the issue.

Had the Court of Appeals not granted the corrective writ, or if that corrective writ be reversed, the consequences would have been or would be:

1. Indefinite suspension of the suit in the District Court. It already has been pending three years. "Justice delayed is justice denied".

2. That maxim applies with special emphasis to the inclusion in the stay of the previously ordered pretrial discovery proceedings. During the years of suspension, necessary witnesses may die or become disabled or forget, and documentary evidence will disappear in the process of the periodic destruction of discardable records (see R. p. 179). Also, the longer the delay, the more plausible will be "I don't remember" or "I don't know" answers to crucial questions.

3. If the final judgment in the State court action, because of reversal or modification on appeal, should go against Westinghouse or should not contain a ruling on the defense of illegality, or (see *infra*, pp. 9-12) if the presently relied-on ruling should be deemed too indefinite to serve as *res judicata* of the precise point involved—in any of those contingencies—the delay in the Federal court most certainly will have served no purpose, from any point of view, other than that of highly prejudicial delay and dissipation of proof.

4. If, however, the final judgment in the State court should concern itself with the applicability of the Federal Anti-Trust laws and contain sufficiently clear dispository findings of fact, then, the District Court, at the end of the long delay, on the basis of Judge

Walsh's determination (which, in the postulated circumstances, would stand unchallenged) would be likely, if not bound, to hold the State court judgment decisive and thus grant judgment of dismissal without a trial.

5. That would further delay pre-trial examinations and lead to still further dissipation of evidence.

6. If, thereafter, such judgment be reversed, on the ground that Congress having vested jurisdiction over plaintiffs' cause of action exclusively in the Federal courts, a State court judgment cannot be *res judicata*, all the delay and all the intervening proceedings will have been futile (except to damage the plaintiffs), and the case then would first start on the road of normal process which, it would then appear, was plaintiffs' due in the first instance.

It is submitted, as an understatement of the situation, that the balancing of the above alternative consequences does not indicate a necessity for intercession by this Court.

Further Reasons Against Certiorari

1. Because ill consequences usually attend a lengthy stay of proceedings in any case, it is well settled law that a party who seeks such a stay has a heavy burden to establish its propriety in the interests of justice and there may be no "stay of indefinite duration in the absence of a pressing need" (*Landis* v. *North American Co.*, 299 U. S. 248, 255-7; *Meredith* v. *City of Winter Haven*, 320 U. S. 228; *Mottolese* v. *Kaufman*, 176 F. 2d 301, 303, 305-7). While this court has on occasions intervened to abrogate such stays of proceedings or analogous refusals to proceed (*Landis* v. *North American Co., supra; McClellan* v. *Carland*, 217 U. S. 268; *Meredith* v. *Winter Haven, supra*), we

are not aware of any case in which this court, either by review or extraordinary writ, intervened to require or to impose the denial to a litigant of the opportunity to proceed in normal course.[1]

2. Yielding of jurisdiction to State court determination, by stays such as the District Court ordered here, has been definitely proscribed by decisions of this Court even in cases where jurisdiction is coordinate (*McClellan* v. *Carland, supra,* 217 U. S. 268 and cases therein cited; to same effect *Great North Woods Club* v. *Raymond,* 54 F. 2d 1017). In the *McClellan* case, where the Federal court's jurisdiction was purely coordinate, this Court condemned a stay to await and abide the outcome of a State court suit as one whereby the Federal court "had practically abandoned its jurisdiction over a case of which it had cognizance and turned the matter over for adjudication to the State court", and added: "This, it has been steadily held, a Federal court may not do" (217 U. S. at p. 280). How much clearer and stronger is the case against such stays in cases where, as here, only the Federal court has jurisdiction over the pending cause of action!

3. There is no doubt of the power of the Court of Appeals to grant the complained of writ (*U. S. Alkali Association* v. *U. S.,* 325 U. S. 196, 201-4; *De Beers Mines* v. *United States,* 325 U. S. 212, 217-25; *Ex Parte United States,* 287 U. S. 241, 245-251; *Ex Parte Simons,* 247 U. S. 231, 238-40; *McClellan* v. *Carland,* 217 U. S. 268; *Mottolese*

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[1] In *Ex Parte Wagner,* 249 U. S. 465, in affirming a denial of mandamus to review a denial of stay pending a decision by this Court in allied litigation which afforded "the prospect" of rendering "valueless" the results of the further prosecution of the action, this Court said that the denial of the stay was but a "minor" order "in the conduct of judicial proceedings". In *Radio Corp. of America* v. *Igoe,* 348 U. S. 973, this Court refused certiorari to review the denial of mandamus (in 217 F. 2d 218) to grant a stay.

v. *Kaufman*, 176 F. 2d 301, 302; *In re Hohorst*, 150 U. S. 653; *Great North Woods Club* v. *Raymond*, 54 F. 2d 1017; cf. *Maryland* v. *Soper*, 270 U. S. 9, 28-30).[2] Unlike interlocutory orders of the usual kind which, if erroneous, infect the subsequent final judgments and thus can be reviewed upon appeal from the latter—such as the ordering or denying of jury trials, changes of venue, decisions on the pleadings, rulings on questions of law which are followed on the trial—the stay which the District Court ordered in this case never could be reviewed or corrected on appeal. Of course, the holding that a State court judgment would be *res judicata*, if repeated on a motion for judgment or upon a trial, ultimately would be reviewed; but the stay itself would not enter into a final judgment and so could not be reviewed and, in any event, *the long years of delay and the permanent dissipation of evidence wrought thereby never could be rehabilitated.*

4. The power of the Court of Appeals being unquestionable, the most that can be claimed in support of the present petition is that there is presented the question of whether the complained of writ constitutes a wise or unwise exercise of discretion. If that be the issue, it is difficult, we think, to see much room for contest; but in any event, since the Court of Appeals exercised its authority in favor of procedure in ordinary and normal course, it seems manifest that there is involved here nothing "important" or "special" to warrant the engagement of this Court's attention, particularly since even the dissenting Judge (Medina, J.) agreed that it could not be said that any great hardship or inequity would be suffered by Westinghouse if required to go forward (Pet. p. 33; cf. *Landis* v. *North American Co.*, 299 U. S. 248, 250) and his

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[2] *Radio Corp. of America* v. *Igoe*, *supra*, of course, is not to the contrary. There the District Court refused to stay the normal course of the case, and neither the Court of Appeals nor this Court perceived error in that.

concern was rather that "other litigants under similar pressures in other cases may not be able to afford the expense" (Pet. p. 34).

5. There is no conflict among the decisions as to whether a State Court judgment is *res judicata* in the Federal court of a cause of action over which the State Court has no jurisdiction and the Federal Court has exclusive jurisdiction (see discussion at pp. 14-19, *infra*).

6. While there is no decision by this Court specifically on whether a State court judgment can be *res judicata* in a Federal court action under 15 U. S. C. section 15 or 26, on principle the proposition laid down by the majority of the Court of Appeals seems to be almost self-evident, and plainly to follow from *Bowles* v. *Willingham*, 321 U. S. 503, *Porter* v. *Lee*, 328 U. S. 246, *Porter* v. *Dicken*, 328 U. S. 252, *Fleming* v. *Rhodes*, 331 U. S. 100, *Capital Service, Inc.* v. *National Labor Relations Board*, 347 U. S. 501. In those cases, this Court held emphatically that—far from being *res judicata*—State court judgments which interfere with unfettered determination and enforcement by bodies vested by Congress with exclusive or primary or supreme jurisdiction must be swept aside by the Federal courts by appropriate injunctions.[3] It is not questioned and not open to question that Congress had the power to confine to the Federal courts the maintenance of suits for treble damages for violation of its statute against restraint of interstate commerce. To recognize that under the Act of Congress

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[3] In the *Capital Service Inc.* case, for example, this Court wrote: ". . . If the Federal District Court were to have unfettered power to decide for or against the union, and to write such decree as it deemed necessary in order to effectuate the policies of the Act, it must be freed of all restraints from the other tribunal. To exercise its jurisdiction freely and fully it must first remove the state decree. When it did so, it acted 'where necessary in aid of its jurisdiction'."

jurisdiction over the cause of action is exclusively in the Federal Courts, and, at the same time, to hold that the Federal courts are bound to adjudicate the issues of fact and law in accordance with a decision of a State court in which the issue arose only incidentally and partially, is concurrently to both assert and contradict the exclusiveness of the jurisdiction.

7. There is not involved any belittlement, distrust or impugning of the capacity or integrity of the State courts. Our dual system accords exclusiveness to the respective judiciaries in different spheres and coordinate jurisdiction in other spheres. In the fields where the State courts are supreme, there is no belittling of the Federal courts (including this Court) in the requirement that they abide by the judgments of the State courts nor in the disregard by the State courts of Federal court pronouncements on State law having no Federal involvement or on matters exclusively within State jurisdiction. Reciprocally, there is no belittlement of State courts in the disregard of their pronouncements in respect to matters which are confined exclusively to the Federal courts. If there is any quarrel with the withholding from the State courts of coordinate jurisdiction over causes of action under the Federal Anti-Trust laws, the objection can be made only to Congress, and unless and until it prevails there, a Federal court, it is manifest, may not abdicate the jurisdiction which Congress lawfully has decreed shall be exercised only by that court.

8. Furthermore, there is neither certainty nor strong likelihood that it will be necessary in this case to decide the *res judicata* point that has been raised anticipatorily. That is so for two reasons:

First: As already noted (at pp. 2-4, *supra*), if the case henceforth proceeds in the District Court nor-

mally—despite the delays thus far—it may well be that this case will be tried and decided before there is a final judgment in the State court action.

Secondly: Even if final judgment in the State court should precede adjudication by the District Court and even if Lyons' appeals in the State courts should fail completely so that there will be embodied in the final judgment the determination that "the . . . defense of illegality, based upon violation of the anti-trust laws, has neither been sustained nor established" (Pet. p. 5), the judgment, even if binding upon the District Court, will not give rise to an estoppel, because:

(i) It will be impossible to know whether the State courts will have held (a) that the Federal Anti-Trust laws were not violated, *or* (b) that, as Westinghouse strenuously contended (see R. pp. 32-33), such violation, as a matter of law, constituted no defense to recovery of payment for goods within the doctrine of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, *Wilder Manufacturing Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, *Geddes* v. *Anaconda Copper Mining Co.*, 254 U. S. 590, *Small Co.* v. *Lamborn & Co.*, 267 U. S. 248, and *Bruces' Juices* v. *American Can Co.*, 330 U. S. 743 (see discussion in Judge Hand's opinion at pp. 18-19 of Petition; also quotation from the brief which Westinghouse submitted to the State trial court at R. pp. 32-33).

(ii) Moreover, if by what they will have said, the State courts will be held to have meant that the proof failed to establish violation of the Federal Anti-Trust laws, it will be impossible to determine whether they so held because (a) they viewed the proof as failing to establish unlawful price fixing

and sales restrictions and discriminations or (b) they deemed themselves precluded by state statute, as held by the trial court (125 N. Y. Sup. 2d 420; R. pp. 105-8), from going behind the written contracts and thus were bound, regardless of the actualities, to hold that Lyons and all other "distributors" were not merchants but only agents of Westinghouse and by raising such an impenetrable fiction Westinghouse eluded the application of the Federal Anti-Trust laws. In the latter event, it goes without saying that the insertions in the written paraphernalia of a clause to the effect that the writings may not be altered or impeached by parol, would not bar a Federal court in an anti-trust suit from inquiring into the good faith and honesty of the writings, uncovering the true facts and deciding on the basis of the discovered or uncovered actualities—since, surely, the Federal Anti-Trust laws cannot be evaded by the simple strategem of fictitious writings posing as contracts.

To constitute an estoppel, it must be shown that a prior judgment determined the precise question involved (see *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558, 569-572). Hence, where it is not reasonably clear just what facts or propositions of law were decided or intended to be decided, the plea of estoppel, of course, must fail. Petitioners suggest (at p. 9) that these difficulties may be obviated by new findings by the appellate court upon an affirmance of the State court interlocutory judgment. That suggestion, however, alters the basis for a stay from a determination already made and the hope or expectation that it will be affirmed and ultimately embodied into a final judgment to a mere speculation that possibly a determination may be made which, if and when made, would serve as an estoppel. That certainly presents

a most tenuous reason for a stay until ultimate final disposition of the State court action. Thereby the Petitioners' case is reduced to the argument that the District Court should be closed to the respondents upon the mere speculation that if respondents are held out long enough some State court at some time possibly may make a determination which Petitioners hope will serve to turn the respondents out of the District Court.

9. Far from being reasons for staying the respondents, the possibilities, if there be any, that a determination in a State forum, may circumscribe the District Court's freedom to determine the causes of action which are exclusively within its jurisdiction, should serve to impel the District Court to speed its proceedings in an effort to avoid such embarrassment rather than to compel the marking of time in the Federal Court until it is reduced to serving as a mere rubber stamp (cf. cases at pp. 5-6, *supra*). Indeed in those circumstances, the District Court, if it has the power so to do, instead of staying respondents pending a State court final judgment, should have enjoined Westinghouse from proceeding in the State court until after it, the District Court, had tried and decided the anti-trust law causes of action.

10. It was on representations and arguments that judgment in the State court action would not affect the Federal court action that, at an early stage of this case, the District Court and Court of Appeals denied an injunction of the type above suggested (*Lyons* v. *Westinghouse,* 201 Fed. 2d 510, c.d. 346 U. S. 923). In opposing the application for injunction, Westinghouse cited and quoted *Bascom Launder Corp.* v. *Telecoin Corp.,* 9 F. R. D. 677, 678, wherein it was held that the only effect on an anti-trust suit in the Federal court of a judgment adverse thereto

in a State court would be to entitle the plaintiffs in the Federal court action, if successful, to "recover, as part of their damages, the amounts which they may be required to pay to defendant under any such State court judgments" (R. pp. 23-5). The District Court, in denying the application for injunction, cited that case, among others (R. pp. 101-4). On the appeal from that denial, Westinghouse again cited, *inter alia*, the *Bascom Launder Corp.* case, and the Court of Appeals, in its affirmance, stated that it agreed with the *Bascom* case (R. p. 25; also 201 F. 2d 510). Such argument and holding that allowing the State court action to go to judgment would have no effect whatsoever on the disposition of the case in the District Court except to enhance damages, necessarily led to the denial of the application to enjoin the State court action. The converse argument now advanced and agreement therewith, it seems to the undersigned, would have led to the granting of the injunction as "necessary in aid of [the Federal courts' exclusive] jurisdiction" under 28 U. S. C., Sec. 2283. Consequently, it is submitted that petitioner Westinghouse should be held estopped from contending the converse of the argument on which it induced non-interference with the prosecution of the State court action. At the very least, it seems to us, those circumstances militate conclusively against entertainment of the present petition.

11. By the petition herein, Judge Walsh has become an active litigant, on the side of one of the parties, through counsel for that party, and against other parties, in and in respect to a cause pending before him as Judge. It was, of course, eminently proper for him to make a return to the Court of Appeals. However, the determination which that Court made is no different, in essence and in all respects of substance, from a mandate issued on appeal. Certainly no Judge would ever consider litigating a mandate issued to him on appeal or on certiorari. Of what

consequence is the insubstantial difference in the form of the review procedure which brought about the mandate here? Yet the granting of the present petition would sanction the institution and invite the prosecution by judges, as distinguished from the parties, of reviews of appellate decisions affecting causes heard by them and thus, in respect to causes in which they are judges, to become also litigants and make common and partisan cause with some of the parties before them *vis-a-vis* other of the parties.

There Is No Conflict In the Authorities

At pages 5-6 of the petition herein it is stated that the District Court stayed further proceedings in it because it was "satisfied, first, that there were sufficient precedents in the federal courts [*Straus* v. *American Publishers' Ass'n*, 201 Fed. 306 (2d Cir.); *Singer* v. *A. Hollander & Son*, 202 F. 2d 55 (3d Cir.); cf. *Partmar Corp.* v. *Paramount Corp.*, 347 U. S. 89], to suggest that a final judgment in the State Court action would raise an estoppel . . .".

The fact of the matter is that the District Court's decision contains no reference to those cases or to any other case (see Pet. pp. 40-41) and that none of them was cited to the District Court in briefs or argument, whereas the prior reliance on the *Bascom Launder Corp.* case and the approval thereof in the denial of the previous injunction application were stressed in opposition (R. pp. 22-5). The cases mentioned in the above quotation from pages 5-6 of the Petition herein were cited for the first time in the petition to the Court of Appeals for a rehearing.

After carefully considering those cases, Judges Learned Hand and Dimock came to the conclusion that "*none of these decisions throws any doubt upon our opinion already filed*" (Pet. p. 38).

There can be no doubt that the civil actions provided for in 15 U. S. C. Secs. 15 and 26, are "wholly statutory and can only be brought in a District Court of the United States" (*Blumenstock Bros.* v. *Curtis Publishing Co.*, 252 U. S. 436, 440) and that "the . . . State Court did not have jurisdiction over the cause of action and under the anti-trust laws" (*Freeman* v. *Bee Machine Co. Inc.*, 319 U. S. 448, 451).

Consequently, Judges L. Hand and Dimock said that they could not "see how the jurisdiction over a claim arising under Section 15 can be exclusive, if the decision of a state court upon that very claim is to be deemed a bar to an action on it in a federal court." Hence they refused to recognize any authority in *Straus* v. *American Publishers Association*, 201 Fed. 306, which "is now over 40 years old" without ever having been "relied upon" (Pet. at pp. 35-7).

Judges Hand and Dimock could have added the following regarding the *Straus* case: In that case the State court had not purported to make any adjudication concerning or affecting the Federal Anti-Trust laws; its ruling was confined to the impact of a New York court holding in an action expressly founded only upon the New York anti-monopoly statute that the Federal Copyright Law nullified the state statute to the extent that it authorizes a copyright holder to fix resale prices of the copyrighted publications. That holding, however, later was reversed by this Court (*Straus* v. *American Publishers Assn.*, 231 U. S. 222). Thereafter the appeal which had been taken to this Court from the decision in 201 Fed. 306 was dismissed on consent (235 U. S. 716)—probably because, the basis thereof having been vacated by the decision in 231 U. S. 222, it is reasonable to infer, the parties either settled or agreed to the vacatur of the decision in 201 Fed. 306. Furthermore, the basis of the decision in 201 Fed. 306 was not collateral estoppel by judgment but estoppel *in pais* be-

cause, said the court: "The plaintiffs, having the option to go into either court [that is, to sue in the State court under the State statute or in the Federal court under the Federal statute], chose the State court, and their claim, having been there adjudicated, cannot be presented a second time to any other court." That has no application to this case. Lyons did not go into the State court; they were there against their will, as defendants and not as plaintiffs. Lyons asserted no cause of action in the State court. Lyons sought a stay of the State court action. Being there involuntarily and being denied a stay, Lyons were in the predicament that whatever course they followed in the State court in respect to the Federal Anti-Trust laws—whether they asserted a defense thereunder or did not—it would be claimed that they thereby lost their right to their full day in the Federal court: failure to plead the defense would have been claimed a waiver or a recognition of validity, as was claimed in *Singer* v. *A. Hollander & Son,* 202 F. 2d 55; on the other hand, assertion of the defense was destined to lead to the claim now made. It is submitted that neither position is correct and that a party cannot be deprived of his full right to invoke the jurisdiction of the Federal court under the Federal Anti-Trust laws by being involuntarily brought into a State court in an action seeking to enforce a contract claimed to be void under the Federal law. It cannot be gainsaid that *Straus* v. *American Publishers Assn.,* 201 Fed. 306, did not purport to deal with that situation.

In *Singer* v. *A. Hollander & Son,* 110 F. Supp. 71, affirmed 202 Fed. 2d 55, both the District Court and the Circuit Court of Appeals for the Third Circuit expressly held that the State court judgment could not conclude the Federal court by any finding of fact or conclusion of law which related directly to the merits of a cause of action under Section 15 or 26. Judge Forman said in that case that he would not "accept [Hollander's] proposition that

since the same contract and identical restrictive covenants as between the same parties were litigated in the State court suit that the doctrine of *res judicata* compels the disposition of this case favorably to it." To the contrary, Judge Forman continued: "If as Singer argues, the contract although ruled valid by the decision of the [State] Supreme Court, when reviewed in the light of the antitrust laws here can be said to be in violation of them, he is entitled to the remedies provided in those laws" (110 F. Sup. at pp. 79-8). In agreement with those pronouncements, the Court of Appeals for the Third Circuit said (202 F. 2d, at p. 57): "So, the plaintiff urges, he is entitled to have the employment contract looked at anew through Federal eyes. For the purpose of this case only we go along with this argument. The District Judge did also." It was only the State court's findings of fact of a purely collateral nature which were held binding, namely, that plaintiff, in that case, had so grossly and grievously misconducted himself that he was barred from equitable relief by "unclean hands." Whether even that holding is sound is not material here.

The third and last case relied on as constituting a conflict, *Partmar Corp.* v. *Paramount Corp.*, 347 U. S. 89, is patently inapplicable because the prior judgment there involved was not that of a State court but, as Judge Hand pointed out, that "of a Federal Court that had jurisdiction over an action for damages under" Section 15.

As to *Becher* v. *Contoure Laboratories*, 279 U. S. 388, referred to on pages 8 and 10 of the petition and discussed in Judge Hand's opinion on the petition for rehearing (Pet. p. 38), the expressed rationale of that decision was that the State court judgment was conclusive since it was not predicated upon any Federal statute and did not revolve upon any Federal statute. The State court action concerned the employer-employee relationship unaffected by Federal statutes. As an employee in a confidential

relationship to his employer, Becher wrongfully and secretly applied for and procured letters patent in his own name for an invention of his employer which the latter had not wanted to patent and desired to keep confidential. Upon those facts, the State court held Becher a trustee *ex maleficio* for his employer and directed him to transfer the patent to the latter. In defiance of that judgment, Becher thereafter tried to enforce his rights as patentee against others. He was held barred by the judgment decreeing Becher's employer to be the true owner of the patent just as if there had been an assignment by Becher. That was right, said this Court, because the State court judgment did not deal with the patentability of the invention or the validity of the patent but only with the question of who, rightfully and in equity, was the owner thereof; that, said the Court, did not present a question "arising under the patent laws". "It is plain", said Mr. Justice Holmes for this Court, "that the [State court] suit had for its cause of action the breach of a contract or wrongful disregard of confidential relations, both matters independent of the patent law, and that the subject matter of Oppenheimer's [the employer's] claims was an undisclosed invention which did not need a patent to protect it from disclosure by breach of trust . . . Oppenheimer's right was independent of and prior to any arising out of the patent law, and it seems a strange suggestion that the assertion of that right can be removed from the cognizance of tribunals established to protect it by its opponent going into the patent office for a later title".

None of that is applicable to the contention advanced by the petitioners here, except, perhaps inferentially to accentuate the untenability of the contention made here that a State court's findings and rulings directly on the applicability and effect of a Federal statute, which restricted actions thereunder to the Federal courts, shall nevertheless conclude the latter.

Moreover, the three or four cases stressed by petitioners must be viewed in the light of the *Bowles* and other cases referred to at page 8, *supra*.

Emendations

Judge Medina's dissenting opinion as well as the District Court refer to the extensiveness of the pre-trial discovery which had been had in the State court (Pet. pp. 30, 41), as somehow constituting a reason for barring respondents from proceeding in the District Court. In the first place, the overwhelming bulk of that evidence—estimated to be 90% of the testimony and all but "a small fraction" of the documents—related to Westinghouse's cause of action in the State court and had nothing to do with the anti-trust issues (R. pp. 31-32). In the second place, respondent's counsel manifested his desire and readiness to avoid repetition by writing to the attorneys for Westinghouse and General Electric, as long ago as June 19, 1953 (R. pp. 33, 39):

> "As to the persons who have been examined in the State Court action, there has been discussion of stipulating that the testimony already taken be deemed as having been taken also in this action. If that stipulation is entered into, as I hope it will, considerable time and expense will be saved and the examination in this action will be considerably shortened."

The assertion in Judge Medina's dissenting opinion as well as in that of the District Court that the anti-trust suit in the District Court was purely a retaliatory suit (Pet. pp. 30, 41) are predicated upon nothing other than the fact that Westinghouse's suit in the State court came first. If that is valid reasoning, then every counter-suit and certainly every counterclaim is "retaliatory" and thus not only suspect but presumed to be in bad faith and should

be discriminated against in the administration of the judicial process.

In so far as Judge Medina's dissent justifies the District Court's stay on the abstract ground that it is necessary to protect suitors from harassment by "irresponsible people" who "make irresponsible and wholly unfounded offensive and defensive claims", resort to "artful maneuvers and procedural sallies" and endeavor to "subvert justice by ingenious devices" (see Pet. at p. 32), there is nothing in the record to warrant the direction of such language to the respondents. If that language is intended as general arguments for vesting every District Judge with broad and (as Judge Medina argues) unreviewable (therefore, arbitrary) power summarily to deny suitors trials or to be choosey in what suits to hear and what suits not to hear and if those statements are intended to be disapprovals of the Federal liberal discovery procedures which seem to be almost universally praised, those views appear to be directly counter to the principles which govern our judicial system.

The reflections on the probity of the respondents—which would be material only, as happily is not the case, if redress to the courts were limited to persons against whom there is no derogatory information—contained in the opinions of Judge Medina (Pet. pp. 30-31) and of the District Judge (Pet. p. 41), are founded upon nothing more than an isolated excerpt from the opinion of the State Judge who tried the State court action. However, apart from the fact that the holdings of the State Judge still remain to be reviewed by the Appellate Division, the learned Judges seem to have overlooked the rest of the same opinion. That opinion or decision, read in its entirety, shows that Lyons' position in the case was that everything complained of had been done at the instance and with the knowledge and cooperation of Westinghouse and that the court deemed itself, for the most part, precluded from consider-

ng and giving effect to the supporting evidence[4] by a State tatute which the Judge construed to prohibit parol evi-

[4] For example, the record of the State court trial contains pre-rial admissions by Westinghouse's Eastern District Manager Fred S. Kinsey that "We were very friendly with Mr. Lyons and we were always more or less inclined to work together, our people nd his people and himself" (at f. 797) and that as to certain eports in and after 1947 (at ff. 821-9):

"Q. The intent was that they should report all their sales as sales for original installations? A. That is right.

Q. Whether or not that was the fact? A. Yes, I guess so.

Q. You say the intention was that it be so reported, regardless of the facts? A. Yes, it could be.

Q. And so you knew that those reports that were being given to you were false? A. No, I wouldn't say they were false.

Mr. Mintz: Come, Mr. Kinsey.

The Witness: I object to the word 'false'.

Q. You knew they were inaccurate? A. Let's put it that way. That is correct."

The record of that trial contains also the following pre-trial testimony of Westinghouse's "Contract Supervisor" who reviewed the respondent's monthly reports (at ff. 1029-34):

"Q. . . . Were you concerned with whether or not the reports were true? A. No. We accepted the reports as they came from the B Agents.

Q. Whether they were true or false made no difference to you? A. As long as they reported their sales to substantiate their reports.

Q. All you were concerned with, then, was that the papers which you read were consistent with each other? A. That's right.

Q. That is all you cared for? A. That's right.

Q. And that was the understanding of your function? A. That was the understanding.

Q. So it was your understanding in the making out of these credit memoranda you were not to be concerned at all with whether the reports were true or false? A. We allowed the export shipments. So we would have to accept the sales reports and allow service compensation. That was my idea.

Q. Then your idea was that the agent was entitled to service compensation for all his dispositions; is that correct? A. For all of the sales reported."

dence in impeachment of the writings between the parties or showing consent to conduct in variance with the writings (see 125 Sup. 2d 420; R. pp. 105-108). A determination based on technicalities in disregard of the actualities, seems to us a very inadequate basis or reason for denying respondents a full and genuine trial, on the merits, of their Federal Anti-Trust suit, in accordance with Federal law and procedures. Respondents seek nothing else.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

COPAL MINTZ,
Attorney for Respondents.

June 6, 1955.